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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/707,156	11/06/2000	Vivian A. Schramm		8663

7590 09/29/2003
Michael R Schramm
350 West
2000 South
Perry, UT 84302

EXAMINER

WEINSTEIN, STEVEN L

ART UNIT PAPER NUMBER

1761

DATE MAILED: 09/29/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/07156

Applicant(s)

SCHRAMM ET AL

Examiner

S. WEINSTEIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

☒ Responsive to communication(s) filed on 7/3/03

☒ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-14, 21-25 is/are pending in the application.
- Of the above claim(s) _____ is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-14, 21-25 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
 - ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____
 - ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s) 6
- ☐ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other _____

Office Action Summary

Claims 21 and 23-25 are rejected under 35 U.S.C. 112, first paragraph for containing New Matter. As disclosed, the specification only recites that the substances to be placed in a container are edible particulate candy material. The claims are non-enabling and contain New Matter for the phrase edible fluent non-gaseous substance, which is readable on liquids for which there is no disclosure in the specification as originally filed. Claims cannot be amended to recite materials, which are broader than originally disclosed.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-14 and 21-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hunter (GB '356) and Martindale ('797), further in view of Coleman ('884) and Hoeting et al ('870) or vice versa, i.e. Coleman and Hoeting et al in view of Hunter and Martindale, both for the reasons fully and clearly detailed in the Office action mailed April 1, 2003, Paper No. 4. Newly added claims 21-25 are also rejected for the reasons given in Paper No. 4.

All of applicants' remarks filed July 3, 2003, Paper No. 5 have been fully and carefully considered but are not found to be convincing. On page 4 of the amendment, it is stated that since original claim 1 was rejected under 35 USC 102 but not under 35 USC 103, it is understood to be considered non-obvious. This is a misunderstanding of the Patent Laws. If claim language is found to be anticipated by a reference it is also obvious and, one does not make a separate rejection under 35 USC 103 obviousness unless the claim language can be

interpreted differently so that there is a question whether the reference truly anticipates the claim language. In any case, once the claim language is amended, the claim is subject to further examination and review relative to 35USC102 and/or 35USC103.

In regard to the comments on page 5, as applicants admit, they are not the inventors of funnel containing containers. They are also not the inventors of containers, which have funnels for the specific purpose of preventing spillage of contents from the containers wherein the containers can contain particulate materials. Thus, it was known to provide particulate-containing containers with a funnel means to prevent spilling of the contents if the container is knocked over or angled. These teachings, such as Hunter and Martindale, are seen to be generic teachings fairly applicable to any particulates, edible or non-edible. That is, it is not the edibility of the particulates which make them spillable, it is their flowability and the art teaches one to provide a funnel to prevent this problem. As also discussed previously, applicants are not the first to recognize edible particulates share this spillage problem which, of course, is not surprising since it is a flowable material like other particulates. The combination of references, substituting one conventional flowable material for another, or one conventional container for another, is thus seen to have been unequivocally obvious. Applicants appear to attempt to counter the prima facie case of obviousness by showing several examples of commercial products and arguing that none of them used a funnel-containing container to prevent spillage. Obviously, if one reference had both the funnel and the specific conventional particulate, the rejection would have been under 35 USC 102 (anticipation), not 35 USC 103 (obviousness). To argue that no one reference teaches the invention is thus not convincing and not the test for patentability.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is (703) 308-0650. The examiner can generally be reached on Monday-Friday from 7:00 a.m. to 3:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone number for the organization where this application is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

S. Weinstein/dh
September 17, 2003


STEVE WEINSTEIN
PRIMARY EXAMINER 1761
9/29/03